

CRIMINAL REVISION NO.1273 OF 2007

DATE OF DECISION: AUGUST 29, 2007

Boota Ram and another.

.....Petitioners

VERSUS

State of Punjab.

....Respondent

1. Whether Reporters of local papers may be allowed to see the judgement?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

PRESENT: Mr. Kundan Lal Chaudhary, Advocate,
for the petitioners.

Mr. M. C. Berry, Sr.DAG, Punjab,
for the State.

RANJIT SINGH J.

The action of the appellate Court in hearing and deciding the appeal of the present petitioners by hearing the Public Prosecutor alone in the absence of petitioners and their counsel is questioned in the present revision petition. Submission is that this act of the appellate Court can not be legally sustained. Though the petitioners have attempted to justify the reason for which they and their counsel could not appear before the appellate Court on the date it decided the appeal but that, in my view, may not be very relevant to decide the issue in view of the right to be represented by a counsel in a criminal trial being fairly settled and may appear to be a part of the constitutional right guaranteed under Article 21 of the Constitution of India.

The facts, being noted in brief to get the hang of the issue raised, are that the petitioners were convicted for offences under Sections 323, 324, 34 IPC and were sentenced to suffer RI for a period of six months whereas their co-accused Manohar Lal was directed to be released on probation for a good conduct. Though the petitioners were prosecuted on the basis of an FIR lodged against them, Boota Ram (petitioner) had filed a complaint against Vijay Kumar, Basant Lal and Sushil Kumar under Sections 323, 324, 326 read with Section 34 IPC. Both the cases were tried together and decided through two separate judgments on 17.8.2006. The accused in the cross-version were also convicted and sentenced to various terms of imprisonments. They had also impugned their conviction and award of sentence by filing appeal. The appeal filed by the petitioners was admitted and their sentence was suspended on 9.9.2006. The zimni orders produced in the revision petition would show that the case was listed for hearing the appeal on number of dates and was adjourned to be taken on subsequent dates. In the meantime, the petitioners moved an application for leading additional evidence. Appellate Court issued notice of the application and reply to the same was filed. On all these dates, the appellants were present before the court with their counsel. The connected appeal filed by the complainant referred to above was also adjourned from time to time and was finally listed for hearing on 27.7.2007. The zimni orders passed in this connected appeal are also reproduced in the revision till 27.7.2007. It is made out by the petitioners that their appeal was also adjourned to 27.7.2007 and not to 25.7.2007, on which date it was taken up and decided by the Appellate Court in

their absence and in the absence of their counsel. This, according to the petitioners, was the reason for their absence on 25.7.2007, when this appeal was decided by hearing Public Prosecutor only.

Be that as it may, the question that requires consideration is whether the Appellate Court is justified in deciding the appeal of the petitioners without giving opportunity of hearing to them or to their counsel?

Learned counsel for the petitioners has referred to **Ram Naresh Yadav and others Vs. State of Bihar**, AIR 1987 Supreme Court 1500 and **Banchhanidhi Singh alias Nani Singh Vs. State of Orissa**, 1990 Cri. L.J. 397 to say that decision of the Appellate Court in deciding the appeal by only hearing the Public Prosecutor in the absence of counsel representing the appellants or the appellants can not be justified in view of the settled position of law in this regard. The Hon'ble Supreme Court in Ram Naresh Yadav's case (supra) has held that in criminal cases the convicts must be heard before their cases are decided on merits. This was a case where the Court had dismissed the appeal without hearing the appellant or his counsel. Despite having noticed the fact that waiting for appearance by a counsel, when the criminal appeals are called, may hamper the working of the Court and creates a serious problem for it and thus being well conscious of this dimension, the Hon'ble Supreme Court went on to hold that the convicts or accused must be heard before the cases are decided. The Supreme Court observed that case can be disposed of on merits only after hearing the appellant or his counsel and in case no one come present, then the Court might as

well appoint a counsel at the State cost to argue on behalf of the appellants. The order, convicting the appellants therein was set-aside and the matter was sent back to the High Court for passing an appropriate order in accordance with law after hearing the appellants or their counsel and on their failure to engage a counsel, then appoint one and decide the appeal after hearing the counsel so appointed by the Court. In Banchhanidhi Singh's case (supra), the judgment delivered by the appellate Court was held liable to be set-aside on the ground that the same was heard and appeal dismissed by hearing Public Prosecutor alone when none had appeared for the appellant inspite of repeated calls.

In **Khaili and others Vs. State of Uttar Pradesh**, 1982 Supreme Court Cases (Cri.) 143, the Hon'ble Supreme Court has observed that howsoever diligent the learned Judge might have been and however careful and anxious to protect the interests of the appellants in the absence of their counsel, his effort can not take the place of an argument by an Advocate appearing on behalf of the appellants. The Court accordingly found that if the Advocate appearing for the appellants does not appear before the Court and argue, then the Judge should appoint an Advocate as amicus-curiae and then to proceed to dispose of the appeal on merits. Reference in this regard can further be made to **S.Mohan Rao Vs. Bhubaneswar Rath**, 1985 Cri.L.J. 228.

In view of the decisions noticed above, it appears fairly settled that the requirement of a counsel at the time of a hearing of an appeal may not need more elaboration and where the appeal or

the case is decided without hearing the counsel, such a decision is not sustainable.

In my view, the issue needs to be looked into and judged having regard to the constitutional protection given to an accused in terms of Article 21 of the Constitution. An accused has right to be defended by a counsel of his choice as per Section 303 of Cr.P.C. According to Article 21, no person is to be deprived of his life or personal liberty except according to procedure established by law. This Article, which was narrowly construed earlier, has in the recent past been given altogether new dimensions. In **Ranchod Mathur Wasawa Vs. State of Gujarat**, AIR 1974 Supreme Court 1143, the trial was held to be vitiated when the counsel for the accused was not given sufficient time and facilities for preparing the defence. Relevant observations are:-

“..... Sufficient time and complete papers should also be made available to the advocate chosen so that he may serve the cause of justice with all the ability at his command.....”

In **Hussainara Khatoon and others Vs. Home Secretary, State of Bihar, Patna**, AIR 1979 Supreme Court 1369, the trial and conviction was set-aside on the ground that the accused was not offered a free legal aid where he was unable to engage a lawyer. It is held in this case that the procedure which does not make available legal services for the accused can not possibly be regarded as reasonable, fair and just. Reference can also be made to **Madhav Hayawadanrao Hoskot Vs. State of Maharashtra**, AIR 1978 Supreme Court 1548. Similarly, in **Sukh Das and another Vs. Union Territory of Arunachal Pradesh**, AIR 1986 Supreme Court

991 and **Khatri and others Vs. State of Bihar and others**, AIR 1981 Supreme Court 928, the trial without offering legal aid to an indigent accused at State cost was held to be vitiated and conviction set-aside. Accordingly, requirement of a counsel would certainly get attention of a life and liberty clause enshrined under Article 21 of the Constitution of India. The manner in which this Article has received wide and extended interpretation, it may be now difficult to hold that the substance of doctrine of due process as well is not infused into the context of this Article, though it may otherwise appear conservative in nature.

The requirement and importance of a counsel in a criminal trial can well be demonstrated by making reference to the case of **Clarence Earl Gideon Vs. Louie L. Wainwright, Director, Division of Corrections**, (1963) 372 US 335, 9L ed 2d 799. Mr.Gideon was charged with an offence of felony under Florida law and while appearing before the Court, he asked for appointment of a counsel at State expense as he was without funds. This was denied to him, on the ground that it could be done only when offence involves capital punishment. He was put to trial without counsel. Mr.Gideon conducted his defence but was found guilty and sentenced to suffer 5 years imprisonment. He attacked his conviction by filing a writ of Habeas Corpus before Florida Supreme Court on the ground that Court's refusal to appoint counsel for him denied him rights guaranteed by the Constitution and the Bill of Rights by the United States Government. The relief, however, was denied to him by referring to a case of **Betts Vs. Brady**, 316 US 55, 86 L ed 1595,

62 S Ct 1252. Gideon challenged the same before US Supreme Court, which was basically required to review Betts' case (supra) if any relief was to be granted to Mr.Gideon. The Court ultimately re-considered the ratio in Bett's case (supra), which was almost identical to the case of Mr.Gideon. In Bett's case (supra), it was held that refusal to appoint a counsel for an indigent defendant charged with felony did not necessarily violate the Due Process Clause of the Fourteenth amendment, which for reasons given by the Court deemed to be only applicable to federal Constitutional provisions. It was further held in Bett's case (supra) that asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. It was observed that a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights, refusal to appoint counsel under the particular facts and circumstances in Betts case was not so offensive to the common and fundamental ideas of fairness as to amount to a denial of due process. While reviewing and over-ruling Betts case (supra), reference was made to the case of **Powell v. Alabama**, 287 US 45, 68, 77 L ed 158, 170, 53 S Ct 55, 84 ALR 527 (1932), where the need for a lawyer has been stated in the following moving words of Mr.Justice Sutherland:-

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”

Emphasising the need of a counsel in criminal trial, the Court eloquently said:-

“.....even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

The requirement of being represented by a counsel can not be more eloquently put than the afore-mentioned observations made. It is in this context that the judgment in Betts case (supra) was over-ruled. The ratio that can clearly be culled out is that a person can not be assured a fair trial unless he is represented by a counsel and unless counsel is not provided to him if he is poor to have one. To further emphasis this requirement, a reference may be made to following telling reasoning by the U.S.Court in Powell's case (supra):-

“This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused

of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money to hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.”

The fact that the presence of counsel is a necessity can well be highlighted by making reference to the aftermath of Mr. Gideon case. It is understood that Gideon was put to retrial upon setting-aside of his conviction and acquitted after retrial, when defended by a counsel provided to him at State expense.

As already noticed, right of a person charged with crime to be represented by a counsel appears to be fundamental and essential to fair trial in our country as well. This requirement has been emphasized by invoking the life and liberty clause guaranteed under Article 21 of the Constitution of India. The emphasis upon procedural safeguard designed to assure fair trials and equality before law can be read through various provisions of our Constitution. The noble ideal of a fair trial and equal opportunity can not perhaps be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him. Keeping this aspect in view, the provision has been made in the constitution as a directive principle in the form of Article 39A, which provides that the State shall secure that the operation of the legal system promotes justice on

the basis of equal opportunity, and shall in particular provide free legal aid by a suitable legislature or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. This Article, when read with Article 21 of the Constitution, has led the Courts to hold that when an accused is unable to engage a lawyer owing to poverty or similar circumstances, the trial would be vitiated unless the State offers free legal aid by engaging a lawyer to whose engagement the accused does not object. This right arises, the moment the accused is produced before a Court and does not require any application for it. Thus, the right to have a counsel is a constitution guarantee and such right is constitutionally recognised.

In this case, the petitioners were not even asking for being provided with any counsel as they already had one to represent them. Their prayer is short and limited and is to the effect that they have suffered a prejudice on account of their appeal having been decided without hearing their counsel and in their absence. The appeal, being extension of trial and requirement of counsel otherwise being a constitutional guaranteed right can not, thus, be over-looked. The action of the Court in deciding an appeal by only hearing the Public Prosecutor and in the absence of the petitioners and their counsel, as such, can not be sustained. The same would require to be set-aside and it is so ordered. The case will go back to the Appellate Court for deciding the case afresh on merits by affording opportunity to the petitioners to be heard through their counsel. It would be appropriate to request the Sessions Judge, Amritsar, to assign this appeal to some different officer so as to ensure fairness

to the petitioners as the officer, who has dealt with the appeal earlier,
has already given his mind while rejecting the same.

The revision petition is allowed in the above terms.

August 29, 2007

Khurmi

**(RANJIT SINGH)
JUDGE**